United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

RIGINAL 75-7273

To be argued by
RICHARD J. BURKE

B P/S

United States Court of Appeals
FOR THE SECOND CIRCUIT

FELIX MERCED and MODESTA MERCED,

Plaintiffs-Appellants,

against

AUTO PAK COMPANY, INC.,

Defendant-Appellee,

S & C LIQUIDATING CORP., AUTO PAK DIVISION OF FLINCHBOUGH PRODUCTS, DIVISION OF GULF & WESTERN SYSTEMS CO., ALBERT SHAYNE and ARTHUR CONTENT,

Defendants.

FILED
AUG 13 1975

AUTO PAK COMPANY, INC.,

Third-Party Plaintiff,

against

SOUTHBRIDGE TOWERS, INC.,

Third-Party Defendant.

BRIEF FOR DEFENDANT-APPELLEE

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Opinion Below

The opinion of Hon. Harold R. Tyler, Jr., U.S.D.J., Southern District of New York, setting forth his reasons for granting judgment n.o.v. to the defendant appears at pp. 11a to 15a of the Joint Appendix.

Statement of Additional Facts

1. Plaintiff's Testimony as to how he was injured.

Plaintiff, Merced, testified that he had put his head inside the hopper (506a, 562a) while the machine was turned on,

and was reaching with one hand for a piece of wood (a "two-by-four" either three feet long or ten inches long [502a]) which was lying on the deflector plate (507a), while pushing the garbage upwards with a stick held in his other hand. The purpose of pushing with the stick was to cause the garbage to come down (506a). It did come down; and in it was a bottle which hit him, dazing him, and garbage fell on his hand and the machine grabbed his hand (472a). He was five feet ten inches tall and the bottom of the hopper door was three or four feet above the ground (559a-560a), so he had to bend over in order to get his head inside the hopper (562a), at the time he was hit by the bottle. He said he had to "take that risk and put his body inside the machine" (571a). He had not turned off the switch before doing so (473a). He had two hours in which to finish his work with the compactor (517a).

No one had ever told him to put his head inside the machine (562a), or, for that matter, even to put his hand in the machine, while it was operating (477a).

He had been operating the machine for several months before the day that he was injured (563a). Before that, for at least three months, he had watched other porters operating the machine (480a-481a, 484a). He was familiar with the on/off switch on the side of the hopper, he had used it to turn the machine on and off (494a, 495a, 497a). He was also familiar with the button, which, if pressed, would hold the ram in reverse, and he had often seen it used (489a-493a). He was also familiar with the operation of the electric eye (494a, 499a), and he knew that the ram would go into operation if the eye beam was interrupted.

While he was learning to operate the machine, he had seen others using a stick to break up jams and they had explained its use to him (543a-544a), but when garbage was coming down the hopper door was kept closed, he said (540a-541a). He volunteered that if the compactor had

been operated with the door open at these times while he was watching, something could have broken his face (541a). He had been hit once by an object which came out of the machine while he was operating it (473a). [illegible]ently with the door open.

2. Other pertinent testimony.

Plaintiff's witness Herman, building superintendent for Southbridge Towers, testified that half an hour after the occurrence Herman talked with the plaintiff in the hospital and the plaintiff told him that he had tried to clean some glass from the bottom of the machine without turning it off (117a) when he was hurt.

Herman also testified that it was customary to shut off the machine before removing any object from it (83a-84a). That was pursuant to the instructions of the installer (88a-89a). There is a door at the top of the machine which can be closed, shutting off the bottom of the chute from the compactor (91a). If that door is open, and the hopper door is also open while the machine is operating, the garbage would come out of the machine, he said (101a, 104a). So the hopper door is kept closed while the machine is working (105a). The porters were told to shut off the power before putting their hands inside the machine (706a-707a). The plaintiff had been instructed in Spanish how to operate the machine (113a). No other employee except the plaintiff was ever injured by the compactors (705a), and there were nine buildings (78a) each with a compactor.

The advice of Auto Pak, the manufacturer, was to leave the machine turned on continuously (77a). [Danziger, an officer of the installer, testified that customers were advised to let the machine run, and that this would mostly eliminate the problem of "bridging" (184a, 199a) but that some bridging occurred with *all* compactors occasionally (156a). Plaintiff's expert Aaronson agreed that permitting the garbage to accumulate in the chute over night

would tend to cause blockage, and that this tendency may be reduced if the machine is permitted to run continuously (428a, 444a). Deutsch, an engineer, said if the machine was left on continuously there would be no bridging or blockage (690).] However, Herman (Southbridge's superintendent) directed that it be operated only in the morning, afternoon, and evening. When the compactor was turned on in the morning, as a result, the garbage would be piled up as high as the first floor in the chute (97a), so he issued sticks to the porters to enable them to break up the resulting jams without putting their hands inside the machine (79a-80a). The use of sticks, however, was not Auto Pak's suggestion (81a).

Diaz, a former porter (713a), testified that in the mornings when the machine was turned on the garbage would be one or two stories high in the chute (751a). However, he said there were usually no blockages during operation unless a large box was put in the chute (757a).

Rivera, an assistant superintent, said Merced was instructed not to put his hand inside the compactor (607a).

Plaintiff's witness Melendez, a porter, said he was told to use the stick so that he would not have to put his hands inside the hopper (274a). He also said that the reason for pushing the garbage with a stick was to get the job finished faster (271a). He said, and the plaintiff agreed (517a), that the morning work with the compactor had to be finished in two hours (269a). It had to be done fast because the porters had other work to do (269a).

According to Diaz, the plaintiff Merced was told that the garbage had to be out on the street by a certain time, otherwise the Department of Sanitation would miss it and they would have to wait until the next day (720a). Pushing the garbage with a stick would increase the speed with which it would be disposed of, according to Danziger (170a).

Clar, the designer of the compactor, who is now product development director for Gulf & Western (222a), finished

designing the machine in 1968 (247a). Records of his design work, calculations and tests are at the office of Gulf & Western in Red Lion, Pennsylvania (247a-248a, 288a). The machine was tested over a two-year period (259a). Among other objects, it was tested with wooden "two-by-fours" and "four-by-fours", and it destroyed them (300a). He had observed the machine in operation in an apartment house daily for about a month (322a), and up until 1970 (the year the machine in question was sold by Auto Pak [326a]) he had observed at least twenty of the machines in operation in apartment buildings (337a). At the time he was designing the machine he saw compactors made by others, none of which had interlocks on the hopper door (298a). There were no established safety standards for such machines at the time it was designed (309a). The on/off switch on the side of the machine was only about three feet from the door of the hopper (310a).

Plaintiff's expert Aaronson conceded that there were no statutory standards applicable to compactors in 1970 (387a).

According to Deutsch, the compactor here involved, which he examined and tested by putting garbage down the chute (641a), operated well, was in compliance with the Industrial Code, which did not require any interlock on the door, nor did the standards of the industry (650a-651a). Unlike Deutsch, plaintiff's expert Aaronson, although he had the opportunity to do so when he examined the machine, made no effort to find out by testing how well the machine would process garbage (430a-431a).

The National Sanitation Foundation standard for safety, which is reproduced at page 11 of appellant's brief, was not enacted until 1973, long after the sale of the machine here involved (674a), which appellant fails to disclose.

POINT I

The evidence was insufficient to establish defendant's liability.

The plaintiff's complaint alleged that the compactor had "latent" design defects (21a, par. 15), and that such latent defects could not be discovered by the plaintiff (22a, par. 17). There was no amendment of the complaint. In this Court, however, appellant, apparently unhappy about the absence of any latent defect in the machine, and the added fact that plaintiff, according to his own testimony, was well aware of the alleged defects and dangers, argues for some new criterion of designer's liability, instead of the one frequently reiterated by the New York Court of Appeals, and by this Court when applying New York law.

The jury specified, in response to interrogatories (16a-17a), what it considered to be the "defects" in the machine's design. These were that (1) "bridging" (jamming of garbage) occurred, and should have been prevented by the addition to the machine of some "mechanical device"; (2) that if the machine was operated with the hopper door open garbage could ricochet from the deflecting plate; and (3) an "interlock" should have been added to the hopper door (so that the machine would shut off when the door was opened).

It is apparent that these characteristics of the machine, if they can properly be considered to be "defects" in the design, were obvious, and by no stretch of the imagination could be considered "latent", and the record is filled with evidence that they were well known to everyone who had to do with the machine, and in particular they were well known to the plaintiff Merced. He testified to his familiarity with "bridging", to his knowledge that opening the hopper door would not shut off the machine (which was instead done by a conveniently located switch), and to his

personal awareness before the accident (based on his experience) that if the machine were to be left operating with the door open even a bystander observer could get his face broken, as he put it (541a), by emitted rubbish. He said that he had to "take that risk and put his body inside the machine" (571a) at the time he was injured, thus indicating an awareness not only of "defects" but also of *danger.*

The New York Court of Appeals has adhered up to the present time to the basic principle of *Campo* v. *Scofield,* 301 N.Y. 468, that manufacturer's or designer's liability extends only to defects which are "latent" and not reasonably discoverable by the user and certainly not to dangers actually known to the user. That mechanical improvements of a machine are conceivable has not been considered to abrogate this rule or to create liability.

In *Tatik* v. *Miehle-Goss-Dexter Inc.,* 23 N.Y. 2d 828, the plaintiff was operating a printing press which had not been operating properly, and which due to this malfunction caused his hand to be thrown into a position where it got caught in the rollers and injured. He claimed that a number of mechanical improvements and safeguards testified to by his experts would have protected him from the injury. The finding of the Appellate Division (dismissing the complaint) that there was no latent defect the existence of which was not known to the plaintiff and which caused the injuries complained of, was unanimously affirmed by the Court of Appeals. The Appellate Division had noted that the mere fact that "other or additional features might have prevented or minimized the injuries will not serve to support a charge of inherent defectiveness in design" (28 A.D. 2d 1111, 1112).

The rule was reiterated in *Sarnoff* v. *Charles Schad, Inc.,* 22 N.Y. 2d 180, 186 and numerous other New York decisions unnecessary to list.

Beckhusen v. *E. P. Lawson Co.*, 9 N.Y. 2d 726 (cited by appellant), did not change the pre-existing law. The Court of Appeals reporter states the pertinent fact that before the accident the plaintiff there *did not know* that if a certain door under the machine swung open it would cause a cutting blade to descend. The accidental swinging open of this door, which was supposed to be screwed shut, and its resultant interference with the safety mechanism was clearly not a patent danger as a matter of law, and the plaintiff was not aware of it.

Bolm v. *Triumph Corp.*, 33 N.Y. 2d 151 (also cited by appellant), did not change the pre-existing law in any respect here pertinent. That case several times reiterated the rule of *Campo* v. *Scofield, supra,* stating, for example, at p. 157 "There is no liability on the part of a manufacturer for injuries resulting from dangers which are patent or obvious". It held that *under the facts of that particular case* the issue as to latency or patency was a question of fact and not of law, while pointing out, with a quotation from Judge Cardozo, that that question is sometimes a question of law and sometimes a question of fact. The Court also pointed out that in *Codling* v. *Paglia,* 32 N.Y. 2d 330, 342, it had held among other things that the manufacturer could only be liable to the injured user if the user would not by the exercise of reasonable care have discovered the defect and perceived the danger, i.e., a reiteration in different language of the requirement that the dangerous defect be latent and not patent. The only extension of liability in the *Bolm* case was the extension of liability to latent defects which "enhance or aggravate injuries" already sustained (p. 158), which is not pertinent here.

In *Meyer* v. *Gehl Co.*, 36 N.Y. 2d 760, decided March 24, 1975 (also cited by appellant), where the infant plaintiff caught his hand in moving machinery at the rear of a hay unloader wagon, plaintiff claimed that the design was de-

fective because there were no safety devices to shield the moving parts or to stop them upon contact with a foreign object. The Court of Appeals in a one-sentence *per curiam* accompanying its affirmance of a dismissal noted that the machinery was "exposed". Judge Fuchsberg in a lengthy dissenting opinion disapproved of the law of *Campo* v. *Scofield, supra,* and stated (p. 765) that "there is no reason except for allegiance to the patent-danger rule to deny the plaintiff the opportunity to establish that the *Gehl* hay unloader is unreasonably designed." Evidently he was of the opinion that the other six judges of the Court were still adhering to *Campo* v. *Scofield, supra,* as had the Appellate Division.

This Court followed *Campo* v. *Scofield* in *Messina* v. *Clark Equip. Co.,* 263 F. 2d 291 (C.A. 2), cert. den. 359 U.S. 1013, applying New York law. The operator of an earth mover had raised the scissor arms from which the bucket was suspended. He opened the door of the cab and got out, and the scissor arms descended, killing him. The plaintiff claimed that the equipment was defective because there was no safety device to prevent the cab door from being opened while the scissor arms were raised. There was proof that the general practice of the industry (unlike the present case) was to have an interlock on the door of the cab. This Court held that the absence of an interlock did not constitute a hidden defect or hidden danger, citing *Campo* v. *Scofield, supra* and *Inman* v. *Binghamton Housing Authority,* 3 N.Y. 2d 137, and affirmed the dismissal of the complaint, on the law, at the end of the plaintiff's case.

The *Campo* and *Inman* cases had stated, incidentally, that it was up to the legislature and not the jury to prescribe the mechanical requirements for safety devices (as the jury attempted to do in the present case).

In *Bowman* v. *Kaufman,* 387 F. 2d 582 (C.A. 2), this Court again applied New York law to the following facts. Plaintiff claimed that the design of a hydraulic car-lift in

a service station was unfit for the purposes intended, because the lift had no safety device to stop a car from overshooting it and there was insufficient space around it to assure an employee's safety in the event of such a mishap. It was held that a dismissal was proper, since the "defect" was "notorious, open and obvious" and there could be liability under New York law only where the defect was "a latent or hidden one".

A number of cases decided in other jurisdictions have applied similar principles to fact situations strikingly similar to the present one.

For example, *Tomicich* v. *Western-Knapp Engineering Co.*, 423 F. 2d 410, (C.A. 9, 1970), which relied upon this Court's decision in *Bowman* v. *Kaufman, supra.* In the *Tomicich* case the court "assumed" *arguendo* that a conveyor belt was negligently designed, since it collected mud on its sheaves when in operation. The plaintiff lost an arm trying to clean the mud from the sheaves with a metal bar after the safety cover was removed and while the belt was in operation. He claimed (like the appellant in our case) that turning the machine off in order to clean it was too time consuming. He said that he would lose his job if he spent such a long time cleaning it. (Merced and other witnesses said he only had two hours in which to get the morning garbage out on the street, and appellant's brief argues that it would have taken too long to turn off the compactor while breaking up jams). The *Tomicich* court affirmed a judgment on the law for the defendant, pointing out that the plaintiff was aware of the danger, which was obvious, and voluntarily exposed himself to a known danger. Whatever the plaintiff's rights may have been against his employer, the defendant manufacturer's duty did not extend to protecting the plaintiff from harm under such circumstances.

Kerber v. *A.M.F.*, 411 F. 2d 419, applied Missouri law, which in this respect is the same as New York law, to a

case where a worker injured his hand in a baking machine. There was a removable cover, but there was no interlock connected to it. There was a cut-off switch nine feet away. There was no warning of danger affixed to the machine. Plaintiff observed that some dough was stuck in the machine and removed the cover without stopping the machine and inserted his hand to remove the dough. The Court held that the danger was not latent, but was obvious, open and apparent, and that the user of the machine had actual knoweldge thereof, from which it followed that there was no liability of the manufacturer as a matter of law. And see to the same effect *Bartkewich* v. *Billinger,* 432 Pa. 351, 247 A. 2d 603; *Patten* v. *Logemann Bros. Co.,* 263 Md. 364, 283 A. 2d 567.

In the present case there was no evidence which would support a rational jury finding that the alleged "defects" specified by the jury and by the appellant were "latent", or that the danger accompanying the insertion of plaintiff's head into the machine and then causing rubbish to come down was "latent" or unappreciated by him. To the contrary.

Appellant's contention that this question is never one of law and must be determined, regardless of the evidence, by a jury, is of course not supported by authority. The existence of no evidence sufficient to go to a jury means "none that ought reasonably to satisfy a jury that the fact sought to be proved is established". *Blum* v. *Fresh Grown Preserve Corp.,* 292 N.Y. 241, 245-246. Presumably the district judge had this in mind when he stated in his opinion that the evidence "did not support the finding by a reasonable fact finder of manufacturer's liability" (13a). This principle of New York law was held by this Court to be in accord with the "general formulation" [*Noonan* v. *Midland Capital Corp.,* 453 F. 2d 459, 461 (C.A. 2)] and hence appellant's argument at p. 26 of his brief that some unstated "federal" standard should be applied is without substance.

POINT II

Plaintiff's negligence or assumption of risk was the proximate cause of his injury as a matter of law.

It is one thing to poke at rubbish through a hopper door with a stick three feet, or (as the District Judge maintained without contradiction) four feet long (891a), in order to break up a jam. It is quite another to bend over and insert one's head and arms inside the hopper, while the machine is operating, and attempt to remove an object by hand while simultaneously accelerating the downward flow of the rubbish. That was the plaintiff's description of what he did.

He was insistent that he poked the rubbish with a stick with one hand *at the same time* as he reached for the piece of wood on the deflecting plate with the other (507a). His head was inside the machine (506a, 562a). He achieved his stated purpose (506a) of causing the rubbish to come down. What came down included a bottle, and since he had interposed his head it hit him in the head.

Immediately inside the hopper door as he inserted his head the plaintiff would see the moving ram with its teeth (104a, 724a). This makes a loud whining sound when activated (186a, 644a). Behind that was the angled deflecting plate on to which the rubbish would fall on its way down to the ram.

Appellant emphasizes that objects could ricochet from the plate and come out through the door of the hopper, if it was open. The jury listed that as a "defect". But there was no evidence that that happened at the time the plaintiff was injured. The plaintiff did not say that happened, and he was the only eye witness. He said he had his head *inside* the machine when the bottle hit him. Nor was he unware that it was risky to insert his head under a self-produced shower of rubbish inside an operating

machine. He said he had "to *take that risk* to put his body inside the machine" (571a).

But there was no evidence that any other porter had ever found it necessary to take that risk, or to put his head inside while the machine was working. There was much testimony (by Herman, Melendez, Rivera) that porters, including Merced, had been told not to put even their *hands* inside the hopper. Even Merced agreed that no one had ever told him to put his head (562a) or his hands (477a) inside the machine while it was operating, nor did he say he had ever seen anyone else do that. Apparently it was his own idea "to take that risk". Is a manufacturer of machinery obliged by New York law to anticipate such conduct, and attempt to prevent it?

The plaintiff, according to his own testimony, was guilty of such gross contributory negligence or assumption of risk as to break the chain of causation as a matter of law, even if one were to assume that the occurrence of blockages meant that the machine was defective and were to dispense with the requirements that the defect be latent and unknown to the user.*

In *Epstein* v. *John Mullins & Sons Inc.*, 266 App. Div. 665, aff'd. 292 N.Y. 535, plaintiff injured her finger on a splinter while dusting the side rail of a bed and sought to recover for breach of warranty. She had "full knowledge of the defects of which she complained." The Court said that "since plaintiff admittedly had knowledge of the defective condition of the side rail" her damages were "not proximately due to the breach of warranty."

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* On this appeal we assume for the purpose of argument that blockages occurred with some frequency, despite evidence to the contrary. However, the District Judge concluded that they occurred "by no means as frequently as some of the lawyers would have us believe in their arguments * * * particularly plaintiff's lawyer * * *." (923a).

This Court in *Mull* v. *Ford Motor Company*, 368 F. 2d 713 (C.A. 2) approved a directed verdict for the defendant where the operator of a defective automobile, which had stalled, attempted to move it to the curb by using the accelerator and starter of the car in a process known as "bucking", with the hood up blocking his vision. This Court, applying New York law, held that the operator's negligence "as a matter of law was 'so gross as to supersede the negligence of the defendant and insulate it from liability' ". It stated that the jury could not reasonably have found that the manufacturer's alleged negligence was a proximate cause of the injury sustained by a person who was struck by the automobile during this maneuver.

Similarly, in *Tomicich* v. *Western-Knapp Engineering Co.*, 423 F. 2d 410 (the facts of which case are described at p. 10, *supra*) it was held that the plaintiff's negligence constituted an intervening cause as a matter of law, even if the defendant were assumed to be negligent.

Appellant quotes at p. 30 of his brief certain language of the District Judge, taken out of context, to support his argument that the plaintiff was not contributorily negligent. However, the Judge prefaced these remarks with the statement "At the outset, I should say that for this purpose I am assuming that the jury's verdict was legally sound and that we will accept that proposition for present purposes at least" (917a). His subsequent language quoted by appellant required the hypothetical assumption that the jury could legally find the plaintiff free of contributory negligence, and was used with respect to the hypothetical liability over of the third party defendant in that event. The judge had reserved decision on appellee's motions to dismiss at the end of the plaintiff's case (587a), and for a directed verdict at the end of the entire case (763a), and on the motion for judgment n.o.v. (874-875a)—ulti-

mately holding in his decision granting the last motion that the jury's verdict on this and other issues affecting appellee's liability was not legally sound.

CONCLUSION

The judgment ought to be affirmed.

Respectfully submitted,

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376—Affidavit of Service by Mail The Reporter Co., Inc., 11 Park Place, New York, N. Y. 10007

United States Court of Appeals for the Second Circuit

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Auto Pak Company, Inc., Third Party Plaintiff,
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AFFIDAVIT OF SERVICE BY MAIL

State of New York, County of New York **ss.:**

Bernard S. Greenberg, being duly sworn deposes and says that he is agent for Morris, Duffy, Ivone & Jensen the attorneys for the above named Defendant-Appellee herein. That he is over 21 years of age, is not a party to the action and resides at 162 East 7th Street, New York, New York

That on the 13th day of August, 19 75, he served the within Brief of Defendant-Appellee upon Crowe, McCoy, Agoglia & Zweibel attorneys for the above named third party defendant

by depositing 3 true copies of the same securely enclosed in a post-paid wrapper in the Post Office regularly maintained by the United States Government at 90 Church Street, New York, New York

directed to the said attorney for the third party defendant South Bridge at No. 80 East Old Country Road, Mineola, N.Y. 11501

~~N.Y.~~, that being the address within the state designated by them for that purpose, or the place where they then kept an office, between which places there then was and now is a regular communication by mail.

Sworn to before me, this 13th day of August 1975

Roland W. Johnson

ROLAND W. JOHNSON
Notary Public, State of New York
No. 4509705
Qualified in Delaware County
Commission Expires March 30, 1977

Bernard S. Greenberg

Services of three (3) copies of

the within Brief is

hereby admitted this [illegible] day

of August, 1976

Katz, Shandell, Katz, Erasmous & Marcus [illegible]

Attorney for Plaintiff-Appellant

(58420)